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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1954

No. 456

MAX SCHMIDT,

Petitioner,

vs.

ALBERT SHELL, MARTHA SHELL, ARTHUR G. JOHNSTON, DOROTHY E. JOHNSTON, EDWARD C. BRICHTA, DORA R. BRICHTA, FRANK W. DOUGLAS, EDITH E. DOUGLAS, DONALD W. TEETER, ANN TEETER, CASPAR J. HEXBERG, PATRICIA M. HEXBERG, KENNETH THUNEN, SHIRLEY THUNEN, GUSTAVE KOTTA, NELDA M. KOTTA, WILLIAM F. MITCHELL, WANDA MITCHELL, PETE C. RODRIGUEZ, NATALIE RODRIGUEZ, HERMAN T. SCHNEIDER, RITA B. SCHNEIDER, ERNEST S. COCCARY, and HELEN A. COCCARY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the District Court of Appeal, State of California,
First Appellate District, Division One.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the District Court of Appeal, State of California, First Appellate District, Division One.

Max Schmidt prays that a writ of certiorari issue to review the judgment of the District Court of Ap-

peal, State of California, First Appellate District, Division One, entered in the above-entitled case on June 29, 1954, the Supreme Court of the State of California having denied a petition for a hearing on the 26th day of August, 1954.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court of Appeal, State of California, printed in Appendix B hereto, *infra*, page 5, is reported at 126 A.C.A. 378 and 272 P. 2d 82.

JURISDICTION.

The judgment of the District Court of Appeal of the State of California was entered on June 29, 1954. (R. 551-565.) A timely petition for rehearing, filed on July 14, 1954 (R. 566-587) was denied on July 26, 1954. (R. 603.) A timely petition for a hearing by the Supreme Court of California, filed on August 9, 1954, (R. 604-652) was denied on August 26, 1954. (R. 674.)

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3), since rights, privileges and immunities are specially set up and claimed under the Constitution, and statutes of, and authority exercised under, the United States.

QUESTION PRESENTED.

Whether an application of a contractor for priorities for building materials and its granting by the Federal Housing Administration, pursuant to the Veteran's Emergency Housing Act of 1946 and Priorities Regulation 33, is a contract through which the United States is exercising its constitutional powers, and hence a contract whose construction presents questions of federal law not controlled by the law of any state, and a contract that must be construed with reference to the federal statutes and regulations involved rather than by state laws and decisions of California recognizing third party beneficiary contracts in the case of private transactions and causes of action for fraud.

STATUTES AND REGULATIONS INVOLVED.

The statutory provisions involved are sections 5 and 7 of the Veterans' Emergency Housing Act of 1946, 60 Stat. 207, 50 U.S.C.A. Appendix, 1821 et seq., and the pertinent regulation is Priorities Regulation 33 of the Civilian Production Administration, promulgated under the Second War Powers Act of 1942 as amended, 50 U.S.C.A. Appendix, 631-645b. Pertinent portions of said Housing Act and said Regulation are printed in Appendix A, *infra,* page 1.

STATEMENT OF THE CASE.

This action is brought by twelve married couples (veterans and their wives), seeking recovery of damages for the alleged failure of Schmidt, a building

contractor, to comply with the plans and specifications filed with his application to the Federal Housing Authority for priorities for materials used in the construction of homes purchased by the plaintiffs from the defendant.

During the period when the Veterans' Emergency Housing Act of 1946 was in effect, Schmidt applied for priorities for building materials and as a part of his application and as required by federal law, he or his agent signed a certificate which reads in part as follows:

> "* * * I further certify that I will construct the project in accordance with the description given in this application, that I will observe the restrictions on sales prices and rents to be charged for the dwelling units as specified in items 4 or 5 of this application, that I will give preference to veterans in selling or renting the units, and that I will comply with all other provisions of Priorities Regulation 33 and other applicable orders or regulations in the construction and distribution of the dwelling units covered by this application." (R. 60.)

There are thirteen counts in the complaint.

Each of the first twelve counts is brought by one couple, relates to the sale and purchase of a single dwelling unit, and purports to charge the defendant with fraud as to the particular transaction, and each set of plaintiffs asks $4800 for damages. (R. 3-50.)

All plaintiffs join in the thirteenth count and seek to impose liability upon the contractor, Schmidt, as to all twelve sales upon the theory that his application

for priorities and its granting pursuant to federal statute created a contract between Schmidt and the United States of America for the benefit of a third party, i.e., the veterans, and that Schmidt breached, what plaintiffs term, a common law, third party beneficiary contract, by deviation from the plans and specifications which were filed with his application for materials' priorities. The thirteenth count alleges total damages of $57,600.00, or $4800.00 per couple. (R. 50-55.)

In other words, each set of plaintiffs has brought an action on alternative theories of recovery—fraud and breach of a third party beneficiary contract.

The contract of sale with respect to each of the twelve dwelling units was entered into more than one year prior to commencement of the action.

On its face the complaint shows that plaintiffs claim rights and privileges arising out of the Veterans' Emergency Housing Act of 1946 and Priorities Regulation 33. See, for example, paragraphs III thru XVI of the purported first cause of action, (R. 4-10) and paragraphs I thru XVIII of the purported 13th cause of action. (R. 50-54.) (See Appendix "C" *infra,* page 28.)

The federal question to be reviewed was timely and properly raised by the defendant, Max Schmidt, the petitioner herein, by a pleading, to wit, general and special demurrers to the complaint and each of the purported causes of action. (R. 70-77.) (See Appendix "C", *infra,* page 36.) He particularly stressed the point "That it appears from the face of the complaint

that the alleged thirteenth cause of action is barred by the statute of limitations in that the said thirteenth cause of action is alleged to arise out of an agreement between the defendants and the government made for the benefit of third parties in accordance with certain statutes of the United States alleged in the complaint, and that the only portion of said statutes which expresses an intent to benefit third parties or to give third parties a right to sue thereon is subject to a one-year statute of limitations as a limitation upon the right thereby conferred." (R. 76.)

Defendant's general and special demurrers to the complaint were overruled by the trial court. (R. 82.)

In his answer, defendant again raised the federal question, alleging that none of the thirteen counts stated a cause of action, and that it appeared from the face of the complaint that the 13th count was barred by the statute of limitations set forth in Section 7(d) of the Veterans' Emergency Housing Act of 1946, and alleged that there had been a modification or alteration of the original application by consent of the United States Government. (R. 83-93; Appendix "C", *infra,* page 37.)

A jury trial was had, and the jury brought in verdicts of $1250.00 for each set of plaintiffs on the twelve fraud counts, and awarded all the plaintiffs $12,000.00 collectively on the contract count. The defendant appealed.

On his appeal, defendant contended that in the premises (1) plaintiffs are without right to maintain, and have failed to state, a cause of action for fraud,

or a cause of action for breach of contract or for violation of the applicable statutes or regulations; and (2) assuming that plaintiffs may resort to the remedy of fraud, they have, respectively, failed to state a cause of action for fraud, and failed to prove a cause of action for fraud.

However, the District Court of Appeal held (1) that causes of action for fraud and a cause of action for breach of a third party beneficiary contract were stated; (2) that no cause of action for fraud was proved as to nine sets of plaintiffs; and (3) that liability had been established for fraud as to three sets of plaintiffs, and that liability for breach of a third party beneficiary contract (the 13th count) had been established, and reversed the judgments for plaintiffs, with instructions to the trial court to retry the issue of damages only, and when such damages have been ascertained to enter judgments in favor of plaintiffs in the amounts so fixed.

The District Court of Appeal held that the 13th count is supported on a non-federal ground. However, *petitioner submits that the non-federal ground (third party beneficiary theory) cannot independently or adequately support a judgment on the 13th count, because such a non-federal question is clearly interwoven with the federal question involved.* Indeed, the District Court of Appeal expressly calls "the application and its granting under the federal statutes here involved," a contract. If it is a contract, it must, therefore, be a contract made pursuant to a federal statute, and in that case it is a contract that must be construed ac-

cording to the pertinent federal statute, and not according to state law. *United States v. Allegheny County,* 322 U.S. 174; *Kauffman v. Kauffman,* 93 C.A. 2d 808, 210 P. 2d 29; *Wissner v. Wissner,* 338 U.S. 655.

When the California court states that "the federal statute is only relevant as setting up a standard against which to measure the acts of the appellant in failing to perform according to the plans and specifications required by that statute" (Appendix B, page 12), it departs from the established rule of law that the construction of a contract made pursuant to a federal statute presents questions of federal law. The court cites no authority for such departure. It seems to ignore the principle that the Veterans' Emergency Housing Act, as a national law, should be uniform in operation in all of the states.

Petitioner's contention is that if plaintiffs have any right at all to enforce the contract between Schmidt and the United States Government by bringing a civil action against him, that right must be found in the federal statute. Such right is only to the extent covered by section 7(d) of the Veterans' Emergency Housing Act of 1946, which is a one-year statute of limitations. (Appendix A, page 2.) Plaintiffs did not bring such action within the one-year period, and hence they are barred.

Defendant urged these same points in his petition for a rehearing by the District Court of Appeal and in his petition for a hearing by the Supreme Court of the State of California, but, as stated above, both petitions were denied.

REASONS FOR GRANTING THE WRIT.

1. A STATE COURT HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT, AND HAS DECIDED IT IN A WAY PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

The decision of the District Court of Appeal in the instant case is in conflict with the following well-established and fundamental principle, announced and followed by the United States Supreme Court in *United States v. Allegheny County,* 322 U.S. 174, 183:

> "* * * The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state. (cases cited.)"

That basic principle has been applied to War Risk Insurance contracts between the United States and servicemen; and it has been held that there is no third party beneficiary contract created under any state law in connection with such a contract made pursuant to federal statute. See *Kauffman v. Kauffman,* 93 C.A. 2d 808, 210 P. 2d 29, for application of this principle in connection with California law. There the court correctly followed *White v. United States,* 270 U.S. 175, 180, and other federal cases holding that the insurance contract is solely between the government and the insured and the only relations of contract are between the government and him.

The case of *Wissner v. Wissner,* 338 U.S. 655, arose in California. Community funds had been used to pay

War Risk Insurance premiums, and after the death of the insured his surviving wife sought part of the proceeds of the insurance on the ground that she was entitled to them under California community property law. The District Court of Appeal, Third Appellate District, State of California, affirmed a judgment for the wife, but on appeal to the United States Supreme Court judgment was reversed, on the ground that the insurance contract presented questions of federal law not controlled by the law of any state.

In *Sedivy v. Superior Home Builders,* 188 F. 2d 729 (C.A. 7th Cir., Illinois), in construing the Veterans' Emergency Housing Act of 1946, the Court of Appeals held the rights of the purchasers should be construed according to the pertinent statute and regulation, and, at page 734, stated, "that their rights must be determined by the same yardstick whether they sue at law or in equity."

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2. THE QUESTION PRESENTED IS OF IMPORTANCE IN THE ADMINISTRATION OF FEDERAL HOUSING LAWS, AND OF ALL OTHER FEDERAL LAWS UNDER WHICH PRIORITIES MAY BE GRANTED TO CONTRACTORS UPON THEIR PROMISE TO DO OR NOT TO DO A CERTAIN THING. IT IS IMPORTANT IN CONNECTION WITH THE CONSTRUCTION OF ANY CONTRACT THAT AN INDIVIDUAL MAY MAKE WITH THE UNITED STATES PURSUANT TO A FEDERAL STATUTE.

Such contracts are primarily governmental regulations of the United States and should not be construed as private contracts under state laws.

It is axiomatic that there should be a uniformity of operation of the laws of the federal government throughout the states, and if such uniformity is to be effected the federal law must be dominant over the laws of the several states.

The third party beneficiary contract is not universally recognized in America. While California recognizes both a creditor beneficiary type of contract, and a donee beneficiary type of contract, some other states recognize only the donee beneficiary type, and still others recognize only the creditor beneficiary type; and some don't recognize any third party beneficiary contract at all. So far as petitioner knows, the United States Supreme Court has never definitely accepted the third party beneficiary contract theory. (See *Second National Bank v. Grand Lodge,* 98 U.S. 123.)

Although the District Court of Appeal says that the purchasing veterans have common law rights in addition to the rights given by the federal statute, it is clear that the 13th count of the complaint is not brought upon any generally recognize "common law" right, but instead is purportedly brought under a California statute permitting enforcement of a third party beneficiary contract.

It would be ridiculous to assume that when the United States granted the application for priorities under the Veterans' Emergency Housing Act, it intended that purchasers in California should receive rights that purchasers in other states would not receive under identical applications for priorities. Indeed, there is no authority cited for the holding that

the Federal Government entered into a third party beneficiary contract—except to the extent set forth in Section 7(d) of the Act.

If the Congress had intended that the veterans purchasing homes under the Veterans' Emergency Housing Act of 1946 should receive additional rights of enforcement above and beyond those specified in Section 7(d), it would have been a very easy matter to spell out such rights in the Act.

In *United States v. Sauers,* 99 F. Supp. 753 (D.C. Minn. 3d Div.) the Government brought an action under Section 7(a) and (c) of the Act, against a building contractor, for a mandatory injunction requiring the defendant to make restitution to certain purchasers of homes constructed by the defendant, with reference to which the Government contended there were "omissions" and "substitutions" amounting to a departure from the "specifications contained in the application as approved by the Federal Housing Administration" governing the maximum sale price.

The U.S. District Court said, "It is conceded that the individual purchasers who would benefit by recovery are barred by the applicable statute of limitation." This can only mean that the United States, through the administrative agency involved, agreed that the purchaser had no right to bring an action for damages for non-conformity with the specifications after the one-year statute of limitations had expired. While the Court held that the United States was not bound by that one-year statute (Section 7(d)), it clearly did not hold that the Government had six years, under the

Minnesota statute of limitations, within which to bring an action on contract. The Court in effect held that the Minnesota state law concerning contracts did not apply. In rendering judgment for the defendant, the Court said, at 99 F. Supp. 755:

> "Plaintiff permitted three years to elapse after the sale of the houses before instituting this proceeding. *The relief sought is governed by the applicable Housing Act,* a war measure requiring prompt enforcement." (Emphasis added.)

Likewise, in *United States v. Austin,* 100 F. Supp. 33 (D.C. Md.) the Government brought an action, under Section 7(a) *to enforce compliance with a public law.*

Thus, the decision of the California Court is at variance with the well-established construction given the statute by the administrative agents charged with its enforcement. The agents appear to have readily conceded that except for the rights granted by Section 7(d), the purchasers had no rights to maintain causes of action for breach of contract when such causes of action are predicated on failure to comply with the plans and specifications submitted to the F.H.A. On the other hand, the Government had rights under Section 7(a) and (c), to enforce compliance with a public law.

Settlement of the question presented by this petition is plainly in the public interest, for thousands—perhaps millions—of American citizens should be apprised of their rights as potential third party beneficiaries in the event the established national law is to

be or has been changed so that state law can be applied in construing contracts made by the United States Government pursuant to a federal statute. If on the other hand, the law still is, as petitioner contends, that a contract made pursuant to a federal statute must be interpreted according to that statute, and not according to state law, then in that event, American citizens should be spared fruitless litigation and multitudinous suits, by a determination of that question by this court.

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3. THE DECISION OF THE DISTRICT COURT OF APPEAL IS BELIEVED TO BE ERRONEOUS.

No statutory cause of action for fraud was given to the veterans by the Veterans' Emergency Housing Act of 1946. No cause of action for fraud under the laws of California has been pleaded or proved, since no "out-of-pocket loss" has been alleged or proved. See *Bagdasarian v. Gragnon,* 31 Cal. 2d 744, and *Gagne v. Bertran,* 43 A.C. 486.

There can be no doubt that if Schmidt's application and its granting by the United States Government was a contract, it was a contract made in pursuance of a federal statute.

Since it was a contract made in pursuance of a federal statute (and not a simple common law contract), it must be construed with reference to that statute rather than by state laws and decisions governing private transactions. (*United States v. Allegheny County,* 322 U.S. 174, and cases cited therein; *Kauffman v. Kauffman,* 93 C.A. 2d 808; *Wissner v. Wissner,* 338 U.S. 655.)

The lower court errs, therefore, in holding that: "Respondents here are relying on common law causes of action that do not find their origin in that statute. The statute merely establishes the standard by which appellant's conduct is to be measured."

The opinion of the District Court of Appeal states: "All the federal cases to which we have been referred that have found it necessary to discuss the nature of the application and its granting under the federal statutes here involved, have referred to it as creating 'a contract' between the government and the contractor. (*United States v. Sauers,* 99 Fed. Supp. 753, 755; *United States v. Austin,* 100 Fed. Supp. 33, 41.)"

However, neither the *Sauers* case nor the *Austin* case was an action on the contract. Both actions were brought by the Government under Section 7(a) of the Veterans' Emergency Housing Act to enforce compliance with a public law. As a matter of fact, in the *Sauers* case, although Minnesota has a six-year statute of limitations for contracts, the Court held that the plaintiff was guilty of laches for having failed to bring the action within three years after the sale of the houses, since the relief sought was governed by the applicable Housing Act.

The lower court also states that in *Adams v. Albany,* S.D. Cal. N.D., 80 Fed. Supp. 876, "it was indicated, by way of dicta, that common law remedies existed under the Veterans' Emergency Housing Act of 1946." But in that case the common law remedies sought were for common law causes of action for fraud in the breach of an express contract between the purchaser and the seller—not for any breach of a

denied, 342 U.S. 902) where the Court held that as to dwellings built under the Veterans' Emergency Housing Act of 1946, any right of action was barred by the one year limitations, and that insofar as the Second War Powers Act gave veterans the right to recover excess charges made for housing, it was superseded and supplanted by the Veterans' Emergency Housing Act of 1946.

The U.S. Court of Appeals, 7th Circuit, expressly distinguished the case of *Keele v. Holt, supra,* affirmed the order of the trial Court dismissing the complaints, and stated at 188 F. 2d 734:

> "* * * plaintiffs bring their actions in equity for a mandatory injunction requiring restitution. Emphasis is placed upon the inherent power of a court of equity to remedy the wrong assertedly perpetrated upon the plaintiffs, and it is argued that to do so we need not rely upon any express statutory provisions. Whether plaintiffs were entitled under the 1946 or any other Act to proceed in equity for an injunction presents a dubious question which we need not decide. At any rate, no case is cited and we know of none which would authorize a court to order the restitution sought, in the absence of statutory authority. Plaintiffs appear to so recognize because by their complaints they attempt to state a cause of action based upon their rights as fixed by statute and regulation. Under the circumstances, we are of a view that their rights must be determined by the same yardstick whether they sue at law or in equity."

It is respectfully submitted that any rights and remedies which plaintiffs may have to enforce the

promise that the contractor made to the Government, must arise out of the federal statute and regulation involved. The so-called contract is not independent of the statute. It it were not for the federal statute, there would have been no such application for priorities. It is from the statute itself that plaintiffs obtained whatever rights of enforcement they may have.

Since Respondents have not brought themselves within the provisions of the federal statute by commencing their action within one year from the date of the respective sales, they have failed to state and prove a cause of action. Consequently, the District Court of Appeal of the State of California has erred in holding that any causes of action were stated or proved.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
November 19, 1954.

Respectfully submitted,
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(Appendices A, B and C Follow.)